

PART A: ARTICLES

THE CHANGING NATURE OF THE RELATIONSHIP BETWEEN THE UNITED NATIONS SUBCOMMITTEE ON PREVENTION OF TORTURE AND NATIONAL PREVENTIVE MECHANISMS: IN SEARCH FOR EQUILIBRIUM

ELINA STEINERTE*

Abstract

The unique aspect of the mandate of the UN Subcommittee on Prevention of Torture (SPT) lies in the relationship that the Optional Protocol to the UN Convention against Torture (OPCAT) puts in place between the SPT and National Preventive Mechanisms (NPMs) established by State Parties at their national levels. However, at least initially, the SPT struggled to find its feet in its engagement with NPMs: faced with crippling budgetary problems and uncertainty over the best ways for interaction with NPMs, the SPT spent its initial five years nearly side-lining its national counterparts. The Fifth Annual Report of the SPT indicates a turning point in the way it intends to engage with NPMs. Introducing new type of visits, changing its attitude towards engagement with NPMs outside its visiting mandate and reshuffling its internal structure are all signs of the change in the nature of the relationship between the SPT and NPMs. After five years, the SPT is finally signalling its readiness to embrace the relationship with its colleagues at national levels and this is a relationship that all those engaged with the prevention of torture have every right to have high expectations of.

This article will examine the relationship between the SPT and NPMs to date and the way it has been changing over the past year. It will argue that the changes introduced by the SPT vis-à-vis NPMs are promising signs of the Subcommittee finally establishing some equilibrium in its relationship with its national counterparts, NPMs. It is submitted

* Human Rights Implementation Centre, University of Bristol. Thanks are due to Prof. Rachel Murray and Prof. Malcolm Evans of the Human Rights Implementation Centre, University of Bristol for their valuable comments on an earlier draft of this article. Any inaccuracies are the sole responsibility of the author. All internet citations used in this article were last accessed on 9 November 2012.

here that without such equilibrium the premise of torture prevention encapsulated in OPCAT cannot be achieved.

Keywords: NPMs; OPCAT; prevention of torture; SPT; visiting mechanisms

1. INTRODUCTION

The Optional Protocol to the United Nations Convention against Torture (OPCAT)¹ is the only United Nations (UN) human rights treaty solely aimed at prevention. There is not a single provision in the treaty calling for a redress if a breach of a right has occurred. Rather, it sets out a mechanism for pre-empting the occurrence of torture and other cruel, inhuman or degrading treatment or punishment through visits to places of deprivation of liberty undertaken by independent international and national bodies.² The independent international body is OPCAT's treaty body, the Subcommittee on Prevention of Torture (SPT)³ while the role of the national ones is subsumed by National Preventive Mechanisms (NPMs) which each OPCAT's State party must establish.⁴ This framework, in turn, makes the mandate of the SPT strikingly different from the mandates of its UN counterparts. The traditional components such as consideration of reports of State Parties or individual complaints⁵ do not feature among the SPT's duties. In contrast, its mandate consists of three core elements: visits to places of deprivation of liberty within the jurisdictions of State Parties to OPCAT; work with the NPMs; and cooperation with other UN and regional mechanisms engaged in the field of torture prevention.⁶

OPCAT is also a unique UN human rights treaty in relation to the type of obligations it sets out for its State Parties,⁷ as each State Party is required to establish

¹ GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199, adopted 18 December 2003.

² Art. 1 OPCAT.

³ Art. 2 OPCAT; the SPT was elected in October 2006 and held its first session from 19 to 23 February 2007. See: UN, 'Press Release: New Panel on Prevention of Torture to hold inaugural session', 16 February 2007, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1727&LangID=E.

⁴ Art. 3 OPCAT.

⁵ For example, the Human Rights Committee is mandated to examine reports submitted by State Parties to the International Covenant on Civil and Political Rights as per Art. 40 of the Covenant and consider individual communications as per Optional Protocol to the same treaty. The Committee against Torture receives and considers reports of State Parties to the Convention Against Torture as per Art. 19 of the same treaty and may receive individual communications if the State Party in question has made a declaration as per Art. 22 of the same treaty.

⁶ Art. 11 OPCAT.

⁷ The only exception here is the UN Convention on the Rights of Persons with Disabilities which obliges states parties to establish independent monitoring mechanisms. See Art. 33 (2): 'States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen,

a new entity at the national level, an NPM.⁸ The mandates of these NPMs very much mirror the mandate of the SPT. The NPMs are to carry out a system of regular visits to places of deprivation of liberty, issue recommendations to authorities, work with national legislative frameworks and engage in other preventive activities.⁹ This is the first time that an international human rights treaty directly mandates national mechanisms to work towards the implementation of an international human rights obligation, namely the prevention of torture.

Perhaps mindful of the complexity that such a mandate, derived from an international human rights treaty, can pose to national bodies, the drafters of OPCAT put in place a special relationship between NPMs and the SPT. This relationship has prompted the treaty body to legitimately describe itself as ‘a new generation of United Nations treaty body with a unique mandate’¹⁰ by arguing that it:

[...] differs from other treaty bodies of the United Nations, in that its core work is in the field and consists not only in visits to States parties to the Optional Protocol, but also in giving advice and assistance to those States and in providing advice and technical assistance, including training, to national preventive mechanisms, with a view to reinforcing the protections of persons deprived of their liberty against torture and other ill-treatment.¹¹

Indeed, due to the special relationship that OPCAT puts in place between the SPT and NPMs, it is fair to say that the SPT is the UN treaty body which has the potential to have a direct, tangible impact on the national levels of State Parties. This impact is something that international human rights mechanisms have been lacking since most can describe their direct engagements with national situations as periodic at best through in-country visits, as in the case of, for example, Special Rapporteurs, or consideration of State reports by the treaty bodies.

It has been five years since the SPT started its work and while the treaty body has clearly been at ease with the visiting aspect of its mandate, its engagement with NPMs has left a lot to be desired. Largely, this shortcoming has been due to severe financial difficulties which led the Subcommittee to declare its inability to fulfil its mandate in its very first year of operation.¹² At that time, despite its willingness to carry out visits

designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.’

⁸ Art. 3 OPCAT.

⁹ Art. 19 OPCAT.

¹⁰ Subcommittee on Prevention of Torture, First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/40/2 (2008), at para. 5.

¹¹ *Ibidem*, at para. 67.

¹² *Ibidem*, at para. 56.

to each State Party at least once every four to five years,¹³ as well as engage actively with NPMs,¹⁴ in the first year of its operation, the SPT was only able to carry out three visits¹⁵ and had no funding for work with NPMs at all.¹⁶ The situation did not appear to improve much over the next few years of the SPT's work,¹⁷ and in the absence of adequate funding the SPT struggled to find other innovative ways of engaging with NPMs. This situation, however, prompted calls upon the SPT to get to grips with the NPM element of its mandate.¹⁸

The Fourth Annual Report of the SPT in 2011 was a careful indication that things may be changing and that the treaty body was rethinking its approach especially in relation to NPMs. This change has now been taken forward with the SPT's visiting programme for 2012 which

[...] reflects the SPT's endeavour to move towards greater effectiveness. The SPT intends to use its visiting mandate in a creative way, by tailoring visits to focus on particular elements of its mandate, when it considers it appropriate to do so. This should enable the SPT to be more efficient, and to engage with a greater number of States parties.¹⁹

This statement, which is also echoed in the SPT's latest, Fifth Annual Report,²⁰ is the strongest signal to date that the SPT is shifting its approach towards its visiting mandate and NPMs, a move that has long been called for.²¹

¹³ *Ibidem*, at para. 15.

¹⁴ *Ibidem*, at para. 29.

¹⁵ A visit to Mauritius took place from 8–18 October 2007, followed by a visit to the Maldives from 10–17 December and a visit to Sweden from 10–15 March 2008. Subcommittee on Prevention of Torture, *op.cit.* note 10, at para. 18.

¹⁶ Subcommittee on Prevention of Torture, *op.cit.* note 10, at para. 53.

¹⁷ See: Subcommittee on Prevention of Torture, Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/42/2 (2009), at paras. 75–76; Subcommittee on Prevention of Torture, Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/44/2 (2010), at paras. 73–74; Subcommittee on Prevention of Torture, Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/46/2 (2011), at paras. 108–109.

¹⁸ Murray, R., 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does not Fit All', *Netherlands Quarterly of Human Rights*, Vol. 26, No. 4, pp. 485–516, at p. 516.

¹⁹ UN, 'Press Release: Subcommittee on Prevention of Torture announces its Programme of Field visits for 2012', 18 November 2011, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11621&LangID=E.

²⁰ Subcommittee on Prevention of Torture, Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/48/3 (2012), at para. 41.

²¹ Murray, R., Steinerte, E., Evans, M. and Hallo de Wolf, A. *The Optional Protocol to the UN Convention Against Torture*, Oxford University Press, Oxford, 2011, Chapter 5.

The present article will argue that the key to the success of OPCAT's preventive system lies in the equilibrium between the mandates of the SPT and NPMs, for it is clear that even with ample funding the SPT will be unable to match the frequency of visits that NPMs as national bodies could potentially ensure. Therefore, the SPT must have reliable associates on the ground in each State Party and, to this end, strong and effective NPMs are natural partners to the treaty body. Certainly, to become such partners, NPMs need to be properly constituted, possess requisite powers and be adequately funded. However, to ensure this, they in turn may well need the support and clout of the SPT. The SPT therefore needs to find the delicate equilibrium in its relationships with NPMs which could well be shifting over time, depending on the development and efficiency of an individual NPM.

2. SUBCOMMITTEE AND NATIONAL PREVENTIVE MECHANISMS: THE TEXT OF OPCAT

The provision for the establishment of NPMs in the text of OPCAT is truly unique as it is the first time that a UN human rights treaty explicitly brings national entities onto the international human rights scene by requiring these national mechanisms to work towards the implementation of an international treaty.²² It is also the first time that a UN human rights treaty prescribes a concrete implementation mechanism to State Parties as opposed to requesting them to take 'measures which give effect' to the rights recognized in the treaty leaving the choice of exact measures up to the State party in question'.²³ Finally, it is also the first time that an international human rights body, the SPT, is mandated to make a potentially tangible difference at domestic levels of State Parties not only through visits but also through work with these national mechanisms.

The obligation to designate NPMs is the distinctive contribution of the Mexican draft²⁴ during OPCAT's drafting process. While at the time it was treated with a degree of suspicion, leading to a proposal from the EU,²⁵ it has now emerged as the

²² This has since been duplicated in the UN Convention on the Rights of Persons with Disabilities, see Art. 33.

²³ For example, as in case of the ICCPR (Art. 40); UNCAT (Art.19) and Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) (Art. 73).

²⁴ The 2001 Mexican proposal introduced National Preventive Mechanisms (NPMs) which would carry out systematic visits to places of detention within their respective States. The mandate of the Subcommittee on Prevention of Torture was to be that of merely supervising and supporting the work of NPMs, providing them with assistance and advice as well as making recommendations to NPMs about their operation and to State Parties in relation to the establishment and functioning of NPMs. The SPT itself would be able to carry out visits to places of detention of State Parties only when NPMs fail to do so: See Arts. 1, 2(1), 15 (1), (3), (5) and (6), 22 of the Mexican Draft, see E/CN.4/2001/WG.11/CRP.1.

²⁵ The EU proposal was prompted by a fear that the obligation to establish NPMs would not be taken seriously and lead to weak national mechanisms lacking independency and so it shifted emphasis

‘most significant single thing which a State can do to prevent torture and ill-treatment occurring over time’.²⁶ Such an appraisal is entirely appropriate: NPMs hold the potential to fill in the gap which many international and regional human rights mechanisms have never been able to fill. This is a constant, day-to-day presence in the country and thus intimate, first-hand knowledge and understanding of the situation in the country as well as the possibility of frequent engagement with the relevant authorities.

The establishment and designation of these national bodies has not, however, been without its problems.²⁷ OPCAT contains little prescription as to how NPMs ought to be construed and this does not go beyond rather broad requirements of independence, both in terms of functional independence and independence of its personnel,²⁸ requirements for professional capacities and diversity of membership and a reference to the Paris Principles,²⁹ which State Parties ‘shall give due consideration to’ when establishing their NPMs.³⁰ The real challenge of course lies with the translation of these requirements into practice and it is with this that the State Parties have been struggling. Perhaps the best evidence of these struggles is the fact that only about a half of OPCAT’s State Parties have designated their NPMs,³¹ which means that about half of all State Parties are in *de facto* breach of their core obligation under OPCAT.³²

In anticipation of these challenges, the drafters of OPCAT bestowed the SPT with two key responsibilities in relation to NPMs: to advise and assist State Parties with their establishment and to offer training and technical assistance to NPMs themselves.³³ However, there is no specific provision of how these are to materialise and there are no specific tools for the SPT identified in the text of OPCAT, which

back to the SPT. The SPT was once again the key body to carry out visits to places of deprivation of liberty within the jurisdiction of State Parties without prior consent. See: Evans, M. and Haenni-Dale, C., ‘Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture’, *Human Rights Law Review*, Vol. 4, No. 1, 2004, 19–55, at p. 42.

²⁶ Statement by Mr Malcolm Evans, Chairperson of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment during the 66th session of the General Assembly, Third Committee, Item 69(a); 18 October 2011, New York. Available at: www2.ohchr.org/english/bodies/cat/opcat/docs/statements/StatementSPT_Chair_to_UNGA67.docx.

²⁷ For detailed analysis on NPMs see: Murray *et al.*, *op.cit.* note 21, Chapter 6; Murray, *loc.cit.* note 18.

²⁸ Art. 18(1) OPCAT.

²⁹ Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles), Resolution 1992/54, endorsed by the UN General Assembly Resolution 48/134, 20 December 1993.

³⁰ Arts. 18(2) and (3) OPCAT.

³¹ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at paras. 20–23; SPT, Fifth Annual Report, *op.cit.* note 20, at para 17.

³² According to Art. 17, the obligation to designate an NPM must be fulfilled within a year of becoming a Party to OPCAT unless a State Party makes a declaration postponing the implementation of this obligation as per Art. 24 OPCAT. According to the United Nations Treaty Collection website, six states have made such declarations: Germany, Kazakhstan, Hungary, Montenegro, Philippines and Romania, available at: treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en.

³³ Art. 11(b) OPCAT.

leaves the Subcommittee free to choose the best way forward. Unfortunately, at least initially, the Subcommittee struggled to rise to the task in relation to NPMs. Certainly not all of the shortcomings in its engagement with NPMs can be attributed to the failure of the treaty body itself as severe budgetary constraints have certainly had a role to play. In fact, these budgetary constraints have been a particular detriment to the ‘NPM component’ of its mandate. In its Third Annual Report, the SPT notes that ‘during the reporting year – and indeed since the Subcommittee began its work – there has been no budget allocation for the Subcommittee to work directly with States or with the national preventive mechanisms’.³⁴ Nevertheless, there have been some missed opportunities.

3. IN-COUNTRY VISITS BY THE SPT: RIPE OPPORTUNITIES FOR ENGAGEMENT WITH NPMs MISSED

In-country visits are the core component of the SPT’s mandate and in spite of severe budgetary constraints, the SPT has so far carried out 18 visits and has further planned.³⁵ These in-country visits also present a perfect opportunity to engage with NPMs; in fact, this is something that the drafters of OPCAT envisaged.³⁶ Starting with the initial draft of OPCAT, which was tabled by Costa Rica,³⁷ the proposed mandate of the SPT was to include the ability to conduct visits to State Parties without prior consent³⁸ since ratification of OPCAT would lead to automatic acceptance of the SPT’s right to visit places of deprivation of liberty in the jurisdiction of a State Party. The interesting nuance in relation to this aspect of the SPT’s mandate was the distinction drawn between ‘missions’ and ‘visits’. The SPT would carry out ‘missions’ to State Parties and during such ‘missions’ it would ‘visit’ specific places of deprivation of liberty. While the bone of contention surrounding this distinction at the time was the issue of consent,³⁹ this nuance is crucial in alluding to the content of the SPT’s

³⁴ Subcommittee on Prevention of Torture, Third Annual Report, *op.cit.* note 17, at para. 4.

³⁵ Subcommittee on Prevention of Torture. ‘SPT Visits’, available at: www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm.

³⁶ For a detailed historical account of the drafting of OPCAT see: Murray *et al.*, *op.cit.* note 21, Chapters 1–3; Evans and Haenni-Dale, *loc.cit.* note 25, at pp. 19–54.

³⁷ Draft Optional Protocol to the Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Costa Rica, UN Doc. E/CN.4/1409, 10 April 1980 (reproduced in Burgers, J. and Danelius, H. *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, Dordrecht, 1988). It should be noted here that this draft Optional Protocol was considered during the adoption of UNCAT but given the controversy surrounding adoption of UNCAT and the difficulties around Art. 20, it was agreed that the proposal would not be tabled until the adoption of UNCAT.

³⁸ Art. 8(2) Costa Rica Draft Protocol (1980).

³⁹ The State would be notified of a ‘mission’, but this would not impact the ability of SPT members to visit any place of detention within the jurisdiction of a State Party without any previous notice. Art. 10 Costa Rica Draft Protocol (1980).

visits that was envisaged during the drafting process. The in-country activities of the SPT were not seen as limited to visiting actual places of deprivation of liberty. The distinction between ‘missions to State Parties and ‘visits to places of deprivation of liberty’ necessarily implied that missions, while incorporating visits to detention places, could and would encompass something more than just inspection of detention facilities. Interestingly, the EU draft reinforced the original distinction between ‘missions’ and ‘visits’⁴⁰ originally established in the Costa Rican draft. While the final text of OPCAT dropped this distinction, the idea behind it can nevertheless still be found in the final text of the treaty.⁴¹

With this historic caveat in mind, there are three aspects in relation to the SPT’s in-country visits and its interactions with NPMs that must be considered: the choice of countries, the types of visits and the contents of visits.

3.1. CHOICE OF STATES TO BE VISITED: INFLUENCED BY THE ESTABLISHMENT OF NPMs?

The text of OPCAT contains little prescription on the way the SPT should choose State Parties for its visits. Article 13(1) requires that the SPT establishes a programme of regular visits and notes that initially this is to be done by a lot. Given the principles guiding the work of the SPT stipulated in Article 2(3) of OPCAT, the selection process should be impartial, objective and non-selective. The Guidelines on Visits,⁴² drawn up by the SPT itself, are conspicuously curt on the matter and only note that when drawing up its programme of work, the SPT ‘shall have regard’ to Articles 1, 11(c) and 31 of OPCAT.⁴³

While OPCAT does not prescribe how many State Parties are to be initially chosen by lot for the initial visits, the Subcommittee decided that these would be three and these happened to be Mauritius,⁴⁴ the Maldives⁴⁵ and Sweden.⁴⁶ Thereafter the SPT

⁴⁰ Arts. 1(b) and (c) EU Draft. According to the EU Draft, the Subcommittee on Prevention of Torture would carry out missions to State Parties to which no objections could be raised. Visits to places of deprivation of liberty would constitute a part of such missions and states would be able to object to visits to particular places of deprivation of liberty on some tightly circumscribed grounds: Art. 3(3) EU Draft. See E/CN.4/2001/WG.11/CRP.2.

⁴¹ Nowak, M. and McArthur, E. *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, Oxford, 2008, at p. 933.

⁴² Subcommittee on Prevention of Torture, Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties, UN Doc. CAT/OP/12/4 (2011).

⁴³ *Ibidem*, at para. 4.

⁴⁴ The visit to Mauritius took place from 8–18 October 2007; See First Annual Report, *op.cit.* note 10, at para. 18.

⁴⁵ The Maldives were visited from 10–13 December 2007; See Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, UN Doc. CAT/OP/MDV/1(2009).

⁴⁶ Sweden was visited from 10–14 March 2008; See Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, UN Doc. CAT/OP/SWE/1 (2008).

employed what it described as a ‘reasoned process’⁴⁷ to choose the next countries to be visited. From the outset, the SPT rather consistently noted that such factors as the date of ratification, development of an NPM, geographic distribution, size and complexity of the State, and existence and work of regional preventive monitoring as well as any urgent issues reported may be taken into consideration when choosing State Parties to visit.⁴⁸ Nearly verbatim, the same wording was repeated in the Second⁴⁹ and Third⁵⁰ Annual Reports albeit in the latter, ‘development of NPM’ was replaced with ‘establishment of NPM’. This slight amendment seemingly indicated the SPT’s concern over the establishment of NPMs as the Subcommittee appeared to be choosing countries to visit also on the basis of how far countries have gone in their efforts to establish an OPCAT-compliant NPM.

The Fourth Annual Report seemed to present a slight departure from these earlier statements as the SPT indicated that it was ‘tending towards a model by which it would seek to visit States parties as soon as possible following their ratification of the Optional Protocol, in order to offer advice and assistance regarding the establishment of its NPM’.⁵¹ Notably, the Subcommittee argued that such visits ‘would be undertaken as an addition to its current regular programme’ and that they ‘need not necessarily include visits to places of detention and so could be of a shorter duration’.⁵²

This change of position rather complicates the picture regarding the criteria for choosing to visit a State Party and even more so if the actual choices made by the SPT are examined in light of these criteria. As of 31 December 2012, the SPT has carried out 18 in-country visits and one follow-up visit. Of these, three have been to European countries,⁵³ eight to the Americas,⁵⁴ two to Asia,⁵⁵ one to Middle East⁵⁶ and five to African countries.⁵⁷ This does not exactly reflect the geographical distribution of OPCAT’s State Parties given that nearly half of them are from Europe.⁵⁸ But then such an approach could be balanced against the active work of the European Committee

⁴⁷ Subcommittee on Prevention of Torture, First Annual Report, *op.cit.* note 10, at para. 14.

⁴⁸ *Idem.*

⁴⁹ Subcommittee on Prevention of Torture, Second Annual Report, *op.cit.* note 17, at para. 14.

⁵⁰ Subcommittee on Prevention of Torture, Third Annual Report, *op.cit.* note 17, at para. 20.

⁵¹ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 45.

⁵² *Idem.*

⁵³ Sweden (2008), Ukraine (2011) and NPM-focused visit to Moldova in 2012.

⁵⁴ Mexico (2008), Paraguay and Honduras (2009), Bolivia (2010), Brazil (2011), Argentina (2012), follow-up visit to Paraguay in 2010 and NPM-focused visit to Honduras in 2012.

⁵⁵ The Maldives (2007) and Cambodia (2009).

⁵⁶ Lebanon (2010).

⁵⁷ Mauritius (2007), Benin (2008), Liberia (2010), Mali (2011) and NPM-focused visit to Senegal in 2012.

⁵⁸ Of the 63 State Parties to OPCAT, 31 are from the European region: United Nations Treaty Collections, available at: treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en.

on Prevention of Torture (CPT) in the region and the willingness of the SPT to avoid any possible duplication with this body.⁵⁹

Otherwise, the countries that the SPT has chosen to visit is a mix of federal and unitary States, States of varying sizes and different scales of complexity of legal systems, as per criteria noted by the SPT. Thus, so far the criteria put forward by the SPT for choosing countries to visit appear to match the actual choices made by the treaty body.

The difficulty arises if the choice of these countries is examined from the perspective of NPM establishment, another criterion advanced by the SPT. Leaving the three countries drawn by a lot to one side, from the countries that the SPT chose to visit only two had in fact established their NPMs by the time the SPT visited them, Mexico and Honduras. Does this mean that the SPT in fact has been favouring the option of visiting State Parties prior to establishment of NPMs so as to enable the Subcommittee to contribute to the NPM designation process as alluded to in the Fourth Annual Report?

Not really. For example, there were four new OPCAT ratifications in 2011⁶⁰ and of these countries none has established an NPM. Yet, none of them is a recipient of any type of visit from the SPT in 2012. In fact, examination of the visits conducted by the SPT so far, leaving aside the three initial ones since these were chosen by lot, reveals that the earliest the SPT has been able to visit a country post ratification was Benin which ratified on 20 September 2006 and was visited by the SPT in May 2008 and Gabon which ratified OPCAT in September 2010 and was due to receive the SPT's visit in 2012. However, in both cases nearly two years passed between ratification and the visit of the SPT. This in turn means the expiry of the one year term for establishing an NPM as prescribed by OPCAT.⁶¹ The inability of the SPT to visit State Parties in a relatively short period of time after ratification is regrettable. Since an NPM must be established within a year of ratification, this is a crucial period when the SPT could make a real difference to the process of NPM establishment. It is of course possible that the SPT has used its visits to State Parties for engagement with NPMs and to that end, the content of the SPT visits will be examined next.

⁵⁹ For an analysis of the relationship between the SPT and the CPT see: de Beco, G., 'The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the OPCAT) in Europe: Duplication or Reinforcement?', *Maastricht Journal of European and Comparative Law*, Vol. 3, 2011, pp. 257–274.

⁶⁰ These were: Bulgaria (1 June 2011), Panama (2 June 2011), Tunisia (29 June 2011) and Turkey (27 September 2011).

⁶¹ Art. 17 OPCAT. There is a possibility to defer this by up to three years by making a declaration under Art. 24. It should be noted, however, that at the time of the SPT's visit, Benin had not established an NPM and as of 1 June 2012 there is no NPM in Gabon either.

3.2. THE CONTENT OF VISITS: ENGAGEMENT WITH NPMs?

Article 11(a) of OPCAT notes visits to places of deprivation of liberty as a crucial component of the SPT's in-country visit. Certainly this is one of the central aspects of the SPT's mandate as the whole *raison d'être* of OPCAT is to ensure that places of deprivation of liberty are visited on regular basis and it is fair to say that this is an aspect the treaty body has had a firm grip on since the start of its work.

Aside from visiting actual places of deprivation of liberty, during its in-country visits the SPT has also been actively engaging with authorities and examining the applicable legislative frameworks. From the outset, the SPT has displayed interest in formal safeguards against ill-treatment provided for in national legislation⁶² and has engaged with issues like definition of torture set out in national legislation⁶³ and corporal punishment.⁶⁴ The SPT has also been keen to examine the implementation of legislation and, thus, has scrutinised gaps between primary and secondary legalisation in federal countries,⁶⁵ aspects of the interpretation of laws⁶⁶ and the proper transformation of international obligations into domestic legislation.⁶⁷ Equally, the SPT has been scrutinising the institutional context through examining mandates and practices of National Human Rights Institutions (NHRIs),⁶⁸ national mechanisms that exercise visits to places of detention,⁶⁹ national complaints mechanisms⁷⁰ and various levels of national judiciary⁷¹ and prosecutor's

⁶² For example, see: Subcommittee on Prevention of Torture, Maldives Visit Report, *op.cit.* note 45, at paras. 17–33; Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Paraguay, UN Doc. CAT/OP/PRY/1 (2010), at paras. 22–29; Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin, UN Doc. CAT/OP/BEN/1 (2011), at paras. 27–30.

⁶³ Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, UN Doc. CAT/OP/HND/1 (2010), at paras. 75–78; Subcommittee on Prevention of Torture, Benin Visit Report, *op.cit.* note 62, at paras. 29–30; Subcommittee on Prevention of Torture, Paraguay Visit Report, *op.cit.* note 62, at paras. 26–29; Subcommittee on Prevention of Torture, Maldives Visit report, *op.cit.* note 45, at paras. 23–25.

⁶⁴ Subcommittee on Prevention of Torture, Maldives Visit report, *op.cit.* note 45, at paras. 26–29.

⁶⁵ Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico Visit Report, UN Doc. CAT/OP/MEX/1 (2010), at paras. 47–57.

⁶⁶ *Ibidem*, at paras. 58–63.

⁶⁷ Subcommittee on Prevention of Torture, Maldives Visit report, *op.cit.* note 45, at paras. 18–22.

⁶⁸ For example, the Human Rights Commission of Maldives (*ibidem*, at paras. 35–43), the Ombudsman's Office in Paraguay (Subcommittee on Prevention of Torture, Paraguay Visit Report, *op.cit.* note 62, at para. 33), and the National Human Rights Commission in Mexico (Subcommittee on Prevention of Torture, Mexico Visit Report, *op.cit.* note 65, at paras. 64–66).

⁶⁹ For example, the Inter-institutional Commissions in Paraguay: see Subcommittee on Prevention of Torture, Paraguay Visit Report, *op.cit.* note 62, at paras. 31–32.

⁷⁰ Subcommittee on Prevention of Torture, Benin Visit Report, *op.cit.* note 62, at paras. 31–44.

⁷¹ For example, the Constitutional Court in Benin (*ibidem*, at paras. 47–50) and the Juvenile Court in Maldives (Subcommittee on Prevention of Torture, Maldives Visit report, *op.cit.* note 45, at paras. 30–33).

offices.⁷² This brief analysis indicates the SPT's concern not only with presence of a proper legal framework but also with the way the framework is interpreted and applied in the domestic system, whether that would be a domestic legal, judicial or administrative system. This approach certainly corresponds to the wide preventive mandate alluded to in the Preamble to OPCAT.

But what about NPMs? So far every in-country visit of the SPT has entailed an NPM element: meeting with the designated NPM,⁷³ discussing its designation and commenting on its appropriateness,⁷⁴ or when no NPM has yet been established, seeking to meet and to take part in discussions about the designation process⁷⁵ and commenting upon the process.⁷⁶ On the surface, it would appear that the Subcommittee has been concerned about the establishment and operation of its national counter-parts, the NPMs. Unfortunately, there is a prominent, common feature that runs through all the SPT's in-country reports that are in the public domain. This is the near curttness with which the SPT describes its engagement with NPMs and the scarcity of recommendations that concern the establishment and operation of individual NPMs. In comparison to the description of visits to places of detention, which normally takes at least one hundred paragraphs of in-country reports, there are no more than a handful of paragraphs devoted to NPMs.⁷⁷ This observation is a quantitative analysis and of course could be misleading as the Subcommittee could

⁷² Subcommittee on Prevention of Torture, Mexico Visit Report, *op.cit.* note 65, at paras. 83–92; Subcommittee on Prevention of Torture, Benin Visit Report, *op.cit.* note 62, at paras. 45–46; Subcommittee on Prevention of Torture, Honduras Visit Report, *op.cit.* note 62, at paras. 87–95.

⁷³ For example, when visiting Mexico, the SPT met with the Mexican NPM 'and exchanged information on working and visiting methods and on the national preventive mechanism's visits to date to places of detention, together with reports of its activities and recommendations'. Subcommittee on Prevention of Torture, Mexico Visit report, *op.cit.* note 65, at para. 27.

⁷⁴ In the case of Sweden, for example, after having met the Swedish NPM and authorities, the SPT noted that while '[I]t is not for the SPT to give an opinion as to the constitutionality of the designation process' it will however 'need to assess Sweden's compliance with the provision of OPCAT'. Subcommittee on Prevention of Torture, Sweden Visit report, *op.cit.* note 46, at para. 35.

⁷⁵ For example, the visit report to Benin notes the SPT's regret regarding its inability to meet with the members of the Ad-Hoc Working Group in charge of NPM process despite repeated requests. Subcommittee on Prevention of Torture, Benin Visit report, *op.cit.* note 62, at para. 17.

⁷⁶ For example, when in Paraguay, the SPT expressed 'its satisfaction at the process that led to the adoption of the draft legislation setting up the National Preventive Mechanism' describing this as 'a model for the open, transparent and inclusive participation of a wide range of stakeholders'. At the same time, the SPT noted with concern the delay in approval of said legislation by the Legislative Commission of the Senate. Subcommittee on Prevention of Torture, Paraguay Visit report, *op.cit.* note 62, at paras. 56–57.

⁷⁷ *Idem.* For example, in the case of Paraguay, there are three paragraphs devoted to the NPM (paras. 56–58) in comparison to 167 paragraphs describing visits to actual places of detention (paras. 59–224). In the case of Sweden, the SPT used 100 paragraphs (paras. 43–141) to report its visits to police facilities and remand prisons, whilst only 23 paragraphs (paras. 19–42) were devoted to the NPM issue (Subcommittee on Prevention of Torture, Sweden Visit Report, *op.cit.* note 46). In the case of Mexico the SPT used three paragraphs to describe the legal framework applicable to the Mexican NPM and three paragraphs to evaluate it, and devoted three paragraphs to recommendations regarding NPMs (paras. 24–32). This can be contrasted with overall 183 paragraphs that deal with

be advancing far reaching recommendations regarding NPMs, expressed succinctly. But, this is also not the case when examined from the substantive point of view. The recommendations regarding NPMs lack the detail that could be expected and at times do not go beyond repeating NPM guidelines⁷⁸ that the SPT had already issued for all NPMs as a generic document.⁷⁹ This failure to go into detail does not portray the SPT as a body really concerned with the individual challenges faced by individual NPMs on the ground and does not echo the expressed wish of the SPT for NPMs to become 'on-the spot visiting mechanisms'.⁸⁰

Crucially, the SPT appears to also be side-lining the drafting history of OPCAT as this far it appears to have failed to utilise the distinction between 'missions to states parties' and 'visits to places of deprivation of liberty'. Whilst the in-country visits have all had some element of NPM discussion whether with State authorities or NPMs themselves, it has never been on an equal par or even remotely close to the attention devoted to inspecting places of deprivation of liberty and issues surrounding this aspect of the mandate. This difference in SPT's engagement with NPMs versus visiting places of deprivation of liberty has been the treaty body's approach in the face of a challenging budgetary situation which has prevented the SPT from carrying out more frequent in-country visits and thus leads to the question of how strategic the SPT has been about using its budget. The fact that the SPT has, notwithstanding very difficult financial times, managed to visit 18 State Parties is an achievement that the treaty body should be congratulated upon. The fact that all of these visits have not been utilised as unique and perfect opportunities to engage with individual NPMs on a one-to-one basis and assist them in a tailored manner is, however, very regrettable.

Perhaps well cognisant of this regrettable reality, in its Fifth Annual Report the SPT announced that:

In identifying countries to visit, the Subcommittee continues to engage in a reasoned process, considering various factors, including making optimal use of the enlarged Subcommittee, making the most efficient use of the financial resources available and ensuring appropriate coverage of States parties. In addition, as in the past, the Subcommittee gives careful consideration to the date of ratification, development of NPMs, geographic distribution, size and complexity of the State, preventive monitoring at the regional level and specific/urgent issues reported.⁸¹

visits to places of detention (Subcommittee on Prevention of Torture, Mexico Visit report, *op.cit.* note 65).

⁷⁸ See: Subcommittee on Prevention of Torture, Sweden Visit Report, *op.cit.* note 46, at para. 41; Subcommittee on Prevention of Torture, Maldives Visit report, *op.cit.* note 45, at para. 71.

⁷⁹ Preliminary Guidelines on NPMs were published with the First Annual Report of the SPT, *op.cit.* note 10, at para. 28. These have been recently updated: Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc. CAT/OP/12/5 (2010).

⁸⁰ Subcommittee on Prevention of Torture, First Annual Report, *op.cit.* note 10, at para. 29.

⁸¹ Subcommittee on Prevention of Torture, Fifth Annual report, *op.cit.* note 20, at para. 89.

The above statement is interesting for two reasons. First, while noting that the situation of insufficient funding persists, the SPT is indicating reconsideration of the way its funds for visits are to be utilised in the future. Second, the establishment of NPMs remains among the criteria for choosing States for in-country visits. Crucially, the combination of these two reasons has led the SPT to announce a new type of visit in 2012.

3.3. TYPES OF VISITS: MOVING BEYOND THE TEXT OF OPCAT

There are two types of visits provided for in OPCAT: regular, in-country visits⁸² and short follow-up visits, which the SPT may propose when it considers it necessary.⁸³ The SPT has, however, alluded to the possibility of two other types of visits. In its Fourth Annual Report, without specifying further what it means, the Subcommittee indicated that it would favour shorter, additional visits to State Parties as soon as possible after their ratification of OPCAT so as to offer advice and assistance regarding the establishment of NPMs.⁸⁴ Moreover, for its programme of visits for 2012 the SPT has announced that it will undertake visits to Argentina, Gabon, Honduras, Kyrgyzstan, Moldova and Senegal, and declared that Honduras, Moldova and Senegal would receive visits focusing specifically on their NPMs.⁸⁵

With this statement the SPT has brought about the fourth type of visit, an ‘NPM focused’ visit, and the SPT has set forth an explanation for such an invention:

Since the resources available are unlikely to permit an increased number of regular visits as currently conceived, the Subcommittee is looking to identify innovative ways of conducting visits. Hence, the Subcommittee has decided that it will seek to undertake visits, combining these where possible, which focus upon the various aspects of its preventive mandate, so that regular visits, follow-up visits, establishing initial contact with new States parties and engaging with NPMs can all be accommodated.⁸⁶

This statement confirms that the SPT is finally moving from words to action in an attempt to fulfil all aspects of its mandate and, using the terminology of Costa Rican and EU drafts of OPCAT text, is ready to move from ‘visits’ to State Parties to fully-fledged ‘missions’ which would go beyond inspections of detention facilities. The announcement of ‘NPM focused’ visits and visits to establish initial contacts with new State Parties are clear indications of this new approach and can only be welcomed.

⁸² Art. 13(1) OPCAT.

⁸³ Art. 13(4) OPCAT.

⁸⁴ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 45.

⁸⁵ UN, *op.cit.* note 19.

⁸⁶ Subcommittee on Prevention of Torture, Fifth Annual Report, *op.cit.* note 20, at para. 41.

Certainly, one cannot help but wonder how this announced combination of visits will translate into practice since the three countries chosen for the regular visits in 2012, Argentina, Gabon and Kyrgyzstan, do not appear to be examples of such. Argentina ratified OPCAT on 15 November 2004 while Kyrgyzstan did so on 29 December 2008, which means both have been parties to OPCAT for a few years now. Gabon ratified on 22 September 2010 and therefore, depending on when exactly the SPT carries out its visit, this may be within two years of its ratification of OPCAT. Arguably this visit could meet the criteria of a visit establishing contact with a new State Party to OPCAT but one must bear in mind that the obligation to establish an NPM must be completed within a year of ratifying OPCAT which means that the SPT would in any case miss this crucial period of Gabon establishing its NPM.

Also in the case of Argentina and Kyrgyzstan, it is unlikely that the SPT will be able to introduce any meaningful NPM element into the visit because Argentina, which received a visit at the end of April 2012, did not have an operational NPM at the time of the visit,⁸⁷ while Kyrgyzstan adopted the requisite NPM legislation only in June 2012. It is thus likely that by the time of the proposed SPT visit in September 2012⁸⁸ there will be no operational NPM in the country. Therefore, the ‘combination of visits’ to which the SPT alludes to in its latest Annual Report does not appear to be possible in case of these countries.

It is slightly different in the case of the first three countries to receive the ‘NPM focused’ visits in 2012, namely Honduras,⁸⁹ the Republic of Moldova and Senegal, which ratified OPCAT on 23 May 2006, 24 July 2006 and 18 October 2006 respectively,⁹⁰ and all have designated their NPMs.⁹¹ Thus, the SPT visits would take place some five years since the respective ratifications with NPMs in place by the time of the visit. This means that the SPT would have the opportunity to engage with NPMs which have at least a couple of years of experience under their belts, which is a promising start. Unfortunately, the SPT has not provided any further details on what exactly it intends to include in such ‘NPM focused’ visits and, given the applicable confidentiality requirement, one may need to wait until the next SPT’s Annual Report to find out any further particulars of this engagement.

⁸⁷ Albeit at provincial level, an NPM was established in Chacho province: see Association for Prevention of Torture (APT), ‘First provincial preventive mechanism set up in Argentina’ (2012), available at: www.apr.ch/en/news_on_prevention/chaco-mechanism/.

⁸⁸ The SPT has announced that its visit to Kyrgyzstan took place from 19–28 September 2012. See: Subcommittee on Prevention of Torture, ‘SPT Visits’, available at: www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm.

⁸⁹ The SPT carried out the ‘NPM focused’ visit to Honduras from 30 April to 4 May 2012. *Ibidem*.

⁹⁰ United Nations Treaty Collection, available at: treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9-b&chapter=4&lang=en.

⁹¹ Honduras has designated the National Committee for the Prevention of Torture as its NPM; in Moldova it is the Ombudsman’s Office in combination with the Consultative Council which are to carry out the NPM functions while Senegal established an entirely new institution for its NPM: the National Observer for Places of Deprivation of Liberty. Association for Prevention of Torture, ‘List of Designated NPMs’, available at: www.apr.ch/en/list-of-designated-npm/.

The interesting aspect to note, however, is that the ‘NPM focused’ visit to Honduras which took place in May 2012 entailed elements of the ‘combination visit’ as the SPT used this visit also for follow-up to its recommendations issued after its first visit in 2009.⁹² Whether and to what extent this practice will be followed in other visits remains to be seen but the initial signs are cautiously encouraging.

4. THE SPT AND NPMs: OTHER ENGAGEMENT

4.1. ENGAGEMENT WITH NPMs OUTSIDE OFFICIAL ‘OPCAT VISITS’

While the official SPT’s in-country visits show its somewhat reluctant, sporadic engagement with NPMs, the SPT has actually done more, but has done so ‘behind the scenes’. The most notable vehicle for specific in-country engagement with NPMs for the SPT over the past years has been the so-called ‘European NPM project’.⁹³ The core aim of the project is to provide support to the European NPMs and enable them to meet and work collaboratively. In the remits of this overall aim, the project has also facilitated the cooperation between the SPT and NPMs. To this end, SPT members have been able to participate in both thematic workshops for NPMs⁹⁴ as well as in on-site exchanges of experiences with NPMs that have made such requests.⁹⁵ During these in-country engagements, for example, members of the SPT, together with international experts participating in the project, have ‘shadowed’ NPM visits and provided practical feedback on the modalities of such visits.⁹⁶ Undoubtedly, this is very important advice for the NPMs that are only getting to grips with their extensive mandates.

⁹² See: UN, ‘Press Release: Expertos de la ONU y órgano hondureño en acción conjunta para prevenir la tortura’ [UN experts and Honduran mechanism in joint action to prevent torture], 4 May 2012, available at: www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12121&LangID=S.

⁹³ ‘Description of the European NPM project’. A Council of Europe and European Commission Joint Programme ‘Setting up an active network of national Preventive mechanisms against torture, an activity of the Peer-to-Peer Network’, co-funded by the Human Rights Trust, Strasbourg, 12 January 2012, LHRCB/NPM (2010)2. For more project details, including Newsletters, see: www.coe.int/t/dghl/cooperation/capacitybuilding/nhrs_en.asp.

⁹⁴ Since the start of the project, there have been nine thematic workshops: on psychiatric institutions (Italy, March 2010); on the police (Albania, June 2010); on the preparation, structure and planning of strategies for NPMs (Armenia, October 2010); on security and dignity in places of deprivation of liberty (France, March 2011); on the methodology on information collection (Estonia, June 2011); inter-NPM discussion on monitoring deportation flights (UK, July 2011); on the roles of doctors (Poland, December 2011); on the role of NPMs and deportation (Switzerland, March 2012); and on irregular migrants (Serbia, June 2012). *Ibidem*.

⁹⁵ There have been five such requests from NPMs from: Poland (May, 2010); Georgia (June, 2010); Spain (November, 2010); Albania (June, 2011); and Armenia (October, 2011). *Ibidem*.

⁹⁶ See for example, ‘European NPM Project On-site Exchange of Experiences, Tirana, Albania, 28 June-1 July 2011’ in *The European NPM Newsletter*, Vol. 17/18, June-July 2011, at p. 6.

Consequently, the project has presented the SPT with opportunities to work with the European NPMs collectively on various thematic issues as well as with some select European NPMs directly on an individual basis. These are welcome opportunities given the scarce resources at the SPT's disposal. However, all these activities are carried out in the remits of a specific project and therefore are not a part of SPT's official work which puts the Subcommittee in a difficult situation. On the one hand the SPT must ensure consistency in the delivery of advice to NPMs. However, on the other hand, engaging with NPMs in the remits of a specific project which has clearly taken a life of its own, might turn out to be a challenging framework within which to achieve such a consistency.⁹⁷

4.2. PRINCIPLE OF CONFIDENTIALITY AND THE SPT'S MANDATE

One aspect that at least initially hampered the SPT's early engagement with NPMs is the way the Subcommittee interpreted the principle of confidentiality applicable to its mandate.⁹⁸ The principle of confidentiality is a crucial one for to the exercise of the SPT's mandate and 'lies at the heart of the philosophy underlying OPCAT'.⁹⁹ It is most evident in relation to the publication of in-country visit reports: the SPT's recommendations and observations are to be communicated to the State Party confidentially and unless the State Party in question requests the publication of a report, it remains confidential.¹⁰⁰ To date, nearly half of the State Parties visited by the SPT have requested publication of their reports¹⁰¹ which the SPT describes as a 'tangible sign of the maturing relationship between the State party and the SPT'.¹⁰²

Initially, however, the SPT interpreted the principle of confidentiality in a very far-reaching manner to the extent that it would not make public its Rules of Procedure¹⁰³ or even announce the designation of NPMs that have been communicated to it.¹⁰⁴ In fact, it was not until the Second Annual Report that the SPT made a list of designated NPMs public on its website.¹⁰⁵ While this reluctance can partially be explained by the SPT's fears that making such information publicly available could be construed as it

⁹⁷ Murray *et al.*, *op.cit.* note 21, at pp. 148–149.

⁹⁸ Art. 2(3) OPCAT.

⁹⁹ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 45.

¹⁰⁰ Art. 16 OPCAT. It should be noted that the SPT may publish the report if the State Party publishes part of a report (Art. 16(2)) and it may also request the CAT to make a public statement or publish a report if a State Party refuses to cooperate with the SPT (Art. 16 (4) OPCAT).

¹⁰¹ These are: Sweden, the Maldives, Mexico, Paraguay, Honduras and Benin.

¹⁰² Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 46.

¹⁰³ *Ibidem*, at para. 47; see also Murray *et al.*, *op.cit.* note 21, at p. 96. These have now been made public: Subcommittee on Prevention of Torture, Rules of Procedure of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP/12/3 (2011).

¹⁰⁴ Murray *et al.*, *op.cit.* note 21, at p. 129; also Murray, *loc.cit.* note 18, at p. 493.

¹⁰⁵ Subcommittee on Prevention of Torture, Second Annual Report, *op.cit.* note 17, at para. 34.

giving a particular NPM a seal of approval, akin to accreditation,¹⁰⁶ the overly zealous application of the principle of confidentiality had its role to play here too.

This hesitancy over what is confidential in SPT's work and what is not now appears to be a mere historical reflection as the Subcommittee has embraced the idea of openness and transparency.¹⁰⁷ The SPT has now, for example, publicised information on designated NPMs as well as provided information on the Annual Reports of NPMs that have been communicated to it.¹⁰⁸ Moreover, it has listed those States that are in *de facto* breach of their obligation to establish an NPM¹⁰⁹ and crucially has made it clear that it would communicate its recommendations following in-country visits not only to the State Party concerned, that is, government officials, but also to the individual NPM when appropriate.¹¹⁰ The inclusion of NPMs among the official recipients of SPT's reports is a remarkably important aspect in the new course adopted by the SPT towards developing NPMs in its national partners.

4.3. ASSISTING NPMS WITH GUIDELINES

According to OPCAT, the relationship between the SPT and NPMs goes beyond the visiting element and includes such important aspects as offering NPMs advice and technical assistance as well as advice and assistance in evaluating the needs and means necessary to strengthen the protection of those deprived of their liberty against ill-treatment.¹¹¹ The initial approach of the SPT towards NPMs outside visits was somewhat timid. There were signs that the Subcommittee recognises NPMs as important partners but is unsure of what exactly this means. At least partially the initial reluctance of the SPT to engage with NPMS can perhaps be attributed to the lack of knowledge and understanding on behalf of the SPT as to what an OPCAT-compliant NPM should look like. After all, OPCAT is the first international human rights treaty which requires establishment of such national entities as NPMs and as noted earlier, contains little guidance on how this must take place.

In an attempt to assist State Parties and to 'facilitate the dialogue with NPMs generally',¹¹² in its First Annual Report the SPT published its 'Preliminary Guidelines for the on-going development of NPMs'. These, however, offered little beyond the text of OPCAT and in fact, on some points, failed to reinforce the

¹⁰⁶ Murray, *loc.cit.* note 18, at p. 493.

¹⁰⁷ Statement by Mr Malcolm Evans, *loc.cit.* note 26.

¹⁰⁸ Subcommittee on Prevention of Torture. 'Annual Reports Received by the SPT from National Preventive Mechanisms', available at: www2.ohchr.org/english/bodies/cat/opcat/annualreports.htm.

¹⁰⁹ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at paras. 20–25; Subcommittee on Prevention of Torture, Fifth Annual Report, *op.cit.* note 20, at paras. 19–21.

¹¹⁰ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 47.

¹¹¹ Art. 11 (b) OPCAT.

¹¹² First Annual Report, *op.cit.* note 10, at paras. 28–29.

provisions of OPCAT altogether,¹¹³ which led to legitimate questions as to their purpose.¹¹⁴ It took the Subcommittee another couple of years to produce the revised version,¹¹⁵ which elaborates on the provisions of OPCAT. These revised guidelines offer some practical advice on how to address some more challenging aspects of NPM mandates and by building upon the bare bones of OPCAT provisions in relation to NPMs, may actually become a useful tool. Moreover, the SPT had indicated that these are just the starting points as it ‘will seek to add additional sections to these Guidelines, addressing particular aspects of the work of NPMs in greater detail’.¹¹⁶

Recently the SPT has also published its ‘Analytical self-assessment tool for National Preventive Mechanisms (NPMs)’¹¹⁷ which is more of a check-list for NPMs on their operational modalities. Similarly to the development of NPM Guidelines, this tool is a preliminary one which alludes to both the fact that in terms of substance it offers little beyond what is already in the public domain through annual and in-country visit reports and that the SPT is likely to offer a more elaborate version of this tool in the future.

All these initiatives show the readiness of the SPT to leave behind its timid approach towards NPMs in favour of a more active advisory role at the generic level by offering commentary-like guidance on the provisions of OPCAT both to State Parties and NPMs.

4.4. ACCREDITATION OF NPMs?

The factor that may have had a major role to play in the SPT’s initial reluctance towards NPMs was the hesitation of the Subcommittee to take a clear stance on whether it would be accrediting NPMs as bodies that are OPCAT-compliant. The reference to Paris Principles in OPCAT,¹¹⁸ coupled with the fact that many NPMs around the world are also NHRIs¹¹⁹ gave rise to the question of whether accreditation carried

¹¹³ For example, the Guidelines do not discuss the mandate of NPMs as per Arts. 19–20 OPCAT, nor the provision encapsulated in Art. 35 OPCAT regarding the requisite privileges and immunities that should be accorded to NPM members.

¹¹⁴ See: OPCAT Contact Group ‘Letter to the UN Subcommittee on Prevention of Torture Commenting on the SPT’s First Annual Report’ (2008), available at: www.bristol.ac.uk/law/research/centres-themes/opcat/docs.html.

¹¹⁵ Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, *supra* note 79.

¹¹⁶ *Ibidem*, at para. 4.

¹¹⁷ Subcommittee on Prevention of Torture, Analytical Self-Assessment Tool for National Preventive Mechanisms (NPMs): A Preliminary Guide by the SPT Regarding the Functioning of an NPM, UN Doc. CAT/OP/12/8 (2011).

¹¹⁸ Art. 18 (4) OPCAT.

¹¹⁹ For a detailed analysis on NHRIs as NPMs, see Steinerte, E. and Murray, R. ‘Same but Different? National Human Rights Commissions and Ombudsman Offices and National Preventive Mechanisms Under the Optional Protocol to the UN Convention against Torture’, *Essex Human Rights Review*, Vol. 6, No. 1, 2009, pp. 77–101.

out by the International Coordinating Committee (ICC) of NHRIs should have any bearing upon the NPMs.¹²⁰ The SPT itself was hesitant from the start to formulate a clear approach. During its initial in-country visits, the SPT was noting that it ‘will assess’ compliance of the State Party with the provisions of OPCAT in relation to the establishment of an NPM¹²¹ and in its Third Annual Report announced that it ‘is working on analytical tools to evaluate the work of those mechanisms [NPMs]’.¹²² There was a further complication caused by the Subcommittee’s announcement in the very same report that accreditation carried out on compliance with Paris Principles is ‘a supplementary mechanism but should not be used as a procedure for accreditation of national [preventive] mechanisms in general, *since it is for the Subcommittee to make such assessments* in specific cases’.¹²³ All of this suggested that whilst the SPT was unwilling to adopt the system of accreditation carried out by the ICC, it was nevertheless unsure of whether it should be accrediting or assessing NPMs in some fashion itself and if so, how.

The idea of NPM accreditation held the potential of huge problems for the SPT and the system of OPCAT. In order to run an accreditation system in a transparent and credible manner, the SPT would need to develop clear and detailed assessment criteria and be able to assess NPMs with sufficient regularity to ensure constant compliance. For a treaty body which meets three times a year for one week sessions and suffers from chronic under-funding, going down the route of formal accreditation procedure was akin to opening ‘Pandora’s box’.

Cognisant of these difficulties, the SPT has now made it clear that it ‘does not, nor does it intend to formally assess the extent to which NPMs conform to the Optional Protocol’s requirements’.¹²⁴ Undeniably, every time the SPT engages with an NPM and especially now that it has started to carry out ‘NPM focused’ visits, an element of appraisal of the extent to which the NPM in question corresponds to OPCAT requirements is bound to occur. But by avoiding formal accreditation process, the

¹²⁰ For a detailed discussion on the relationship between the ICC accreditation and NPMs, see the Policy Paper ‘The Relationship Between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture’, Bristol OPCAT Research Team, November 2008, available at: www.bristol.ac.uk/law/research/centres-themes/opcat/index.html.

¹²¹ Subcommittee on Prevention of Torture Sweden Visit Report, *op.cit.* note 46, at para. 35.

¹²² Subcommittee on Prevention of Torture, Third Annual Report, *op.cit.* note 17, at para. 82.

¹²³ Emphasis added. *Ibidem*, at para. 61. Further challenge was the call from NHRIs themselves for their designation as NPMs. See: The Nairobi Declaration, adopted at the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, 21–24 October 2008, at para. 39, available at: www.ohchr.org/Documents/Countries/NairobiDeclarationEn.pdf. Some State Parties have also sought to use the accreditation of an NHRI by the ICC as a reason why that institution should also be a designated NPM under OPCAT: Murray *et al.*, *op.cit.* note 21, at p. 130.

¹²⁴ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 64. See also Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, *supra* note 79, at para. 2.

SPT has made a very pragmatic decision on the best way to utilise its scarce resources. Thus, the SPT has finally put the issue to rest and this, coupled with a more targeted and creative deployment of available resources, is signalling a more 'NPM-centred' approach which is pragmatic and promises to be more effective.

5. THE CHANGING NATURE OF THE RELATIONSHIP BETWEEN SPT AND NPMs: IN SEARCH FOR EQUILIBRIUM

It has been alluded to already that the winds of change are blowing through the Subcommittee, suggesting significant changes in the way the SPT intends to interact with NPMs. So what and how is the SPT intending to change?

5.1. THE SPT AND NPMs: DURING THE VISITS

One of the crucial points to remember from OPCAT's drafting process is the fear over inadequate resources that would be at the SPT's disposal which would hamper the ability of the Subcommittee to carry out in-country visits and to do so with sufficient frequency. Reality has proven these fears to be well-founded. In its first year of operation, the SPT was able to carry out only three visits and this rate has not increased since. Overall, during its five years of operation, SPT has carried out 18 in-country visits and one follow-up visit whilst the number of ratifications has reached 63.¹²⁵ The SPT's programme of visits for 2012 indicates that the Subcommittee is doubling its visiting capacity and while this is welcome, even with these doubled numbers, the original benchmark set by the SPT to visit every State Party once every five years¹²⁶ is well out of reach. In fact, at the current rate, every State Party can expect to receive a visit from the SPT once per decade, which echoes the statement of the first Chairperson of the SPT:

[...] for the foreseeable future, it will fall to the national preventive mechanisms, the unique feature of the OPCAT, to form the front line of preventing visiting, a role they are best suited to perform, given that they are on the spot.¹²⁷

One of the 'attractions' behind the proposal of NPMs during the drafting process was to address this issue. The presence of NPMs could potentially balance out the (in)frequency of the SPT's visits which certainly adds to the importance of having

¹²⁵ For the list of ratifications see: United Nations Treaty Collection, available at: treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en.

¹²⁶ Subcommittee on Prevention of Torture, First Annual Report, *op.cit.* note 10, at para. 15.

¹²⁷ Casale, S., 'A System of Preventive Oversight', *Essex Human Rights Review*, Vol. 6, No. 1, 2009, pp. 9–19, at p. 19.

proper, OPCAT-compliant NPMs. And after five years of work, the SPT is finally rethinking its approach towards NPMs and recognising the crucial role that NPMs can play nationally and in follow-up to the SPT's visits. In fact, every NPM which carries out its mandate effectively can supplement the fulfilment of the SPT's mandate and thus allows the treaty body to focus its attention to those countries where NPMs are not functioning properly. This complementarity of SPT's and NPM mandates is the essence of the interdependence of the SPT's and NPMs' mandates that the system of prevention encapsulated in OPCAT is premised upon and one which the SPT is uniquely placed to strengthen. Moreover, the visiting mandate of the SPT presents a impeccable opportunity to do just that. It is undeniable that a visit to a country by a UN body galvanizes the attention of authorities and the SPT has witnessed the extent of this when, for example, in anticipation of its visit to the Maldives, an NPM was designated.¹²⁸ As such, in-country visits present a perfect opportunity to ascertain the situation on the ground regarding an NPM, its establishment and functioning and lend to it the support and authority that stems from recommendations made with the clout of a UN treaty body.

The Subcommittee finally intends to capitalise upon the potential that NPMs hold through the introduction of the new type of visit announced for 2012, the 'NPM focused' visit. It is very much hoped that such visits will become catalysts for strengthening the capacities of the NPMs in Honduras, Moldova and Senegal.

Nevertheless, there are two considerations here that the SPT should be aware of and that warrant careful attention from the treaty body. The 'NPM focused' visits will be the first time that the SPT visits a State Party with the sole purpose of engaging with issues surrounding NPM establishment and does so in an official capacity, by utilising its visiting mandate provided for in OPCAT. There is no previous visiting experience to draw upon and no other UN or indeed regional body whose practice could serve as a blueprint for the SPT in its 'NPM focused' visits. The attention that the Subcommittee devotes to its methodology therefore becomes crucial and there are two fundamental issues for it to consider.

First, the SPT should avoid giving the impression of itself as an auditor of the NPM in question. The mandate of the SPT as per OPCAT is to *advise* and *assist* NPMs in the evaluation of the needs and means necessary to strengthen the protection of those deprived of liberty, as well as to offer them training and technical assistance.¹²⁹ Therefore, the SPT's mandate in relation to NPMs is markedly different if compared to the SPT's mandate in relation to State Parties which explicitly requires the SPT to make *recommendations* to the State Party in question regarding the protection of those deprived of their liberty as well as on ways of strengthening the capacity and mandate of the NPM.¹³⁰ Thus, while the SPT may well choose to give some

¹²⁸ Subcommittee on Prevention of Torture, Maldives Visit Report, *op.cit.* note 45, at para. 65.

¹²⁹ Art. 11(b) OPCAT.

¹³⁰ Art. 11(a)(b) OPCAT.

recommendations to the NPM directly as well as the State Party, the text of OPCAT connotes a somewhat different relationship between the treaty body and its national counterparts. The role of the SPT is to strengthen their capacity and effectiveness as preventive bodies rather than to supervise or condemn which is a difficult line to tread. On the one hand, it is certainly for the SPT to evaluate NPMs and their effectiveness and it is inevitable that such appraisals will take place. After all, it needs to know whether it can rely on its national counterpart to do the job. But on the other hand, NPMs also need to feel that they are SPT's national partners and as such they need to be treated as equals rather than feel that their every step is scrutinised. It is therefore very likely that the extent to which the SPT is willing to rely upon an individual NPM varies from State to State or even from time to time, as the NPM matures or undergoes major personnel change, for example. However, it is important that the SPT affords NPMs the possibility to mature and develop as national bodies without the feeling of being supervised but, rather, with the feeling of support from their UN 'parent' body. OPCAT thus presumes the relationship between the SPT and NPMs to be those between competent partners. The SPT should be mindful that its role is to support its NPM partners which is a consideration that should form the core aim of the 'NPM focused' visit.

Second, in order to make each 'NPM focused' visit as meaningful as possible, the SPT should take care to familiarise itself with the NPM in question and the visit must be targeted to address its specific needs. It is inevitable that all NPMs are different. Accordingly, their challenges are nuanced and the priorities are likely to differ. It necessarily follows from this that the SPT's approach to various 'NPM-focused' visits is also rather different so as to accommodate these nuances. Equally, it is reasonable to expect that the approach of the SPT towards a particular NPM would change over the time as the NPM develops into an effective national preventive body or fails to meet such expectations.

The cumulative effect of these two core considerations is an onus on the SPT to wisely tailor its visiting methodology so as not only to accommodate the new type of 'NPM focused' visit, but also to tailor its visit to the specific country and NPM.

5.2. ENGAGING WITH NPMs OUTSIDE VISITS

In the past, the SPT's reluctance in its engagement with NPMs was also evident in its approach towards those NPMs that were willing to travel to Geneva to meet with the treaty body. Hiding behind the provision that the SPT sessions are held in camera,¹³¹ the Subcommittee was reluctant to avail such possibility to willing NPMs.¹³² There were only two such meetings during the initial years¹³³ with no information being

¹³¹ Art. 10(2)(c) OPCAT.

¹³² Murray *et al.*, *op.cit.* note 21, at p. 129.

¹³³ The SPT met with the Mexican NPM during its third session (Subcommittee on Prevention of Torture, First Annual Report, *op.cit.* note 10, at para. 26) and with the Estonian NPM during its fifth

made public as to what was discussed. Of course, this could partially have been explained by the SPT's vigilance not to be perceived as favouring those NPMs which are 'well enough off' to afford the trip to Geneva. Nevertheless, since this was the only option to engage with NPMs outside the in-country visits at the time, it is hard not to concede that such vigilance was misplaced.

The Fifth Annual Report is a clear departure from this early practice. The SPT has now announced that it has held meetings with more NPMs indicating that it welcomes such meetings.¹³⁴ Indeed, the Chairperson has expressly invited NPMs to attend the SPT's plenary sessions 'in order that each might better understand the work of the other, when this is considered to be mutually beneficial'.¹³⁵

Equally, the Fifth Annual Report makes public a number of other initiatives that the SPT has been engaging in relating to NPMs. Thus, the SPT has continued dialogue with State Parties that have failed to establish their NPMs within the time period prescribed by OPCAT,¹³⁶ welcomed the receipt of annual reports of NPMs¹³⁷ and established and maintained contacts with NPMs themselves.¹³⁸ These are all welcome developments which necessarily will require the SPT to re-think the organisation of its own work and the Subcommittee is 'on the case' as it has also announced details of changes in its internal structure.

5.3. CHANGES IN THE INTERNAL STRUCTURE OF THE SPT: REGIONAL FOCAL POINTS AND NPM TEAMS

Taking full advantage of its expanded membership from 10 to 25 members in 2011,¹³⁹ the SPT announced the reshuffling of its internal structure which involved not only an enlarged Bureau¹⁴⁰ but also the appointment of regional focal points (Africa, Asia,

session (Subcommittee on Prevention of Torture, Second Annual Report, *op.cit.* note 17, at para. 37 and Third Annual Report, *op.cit.* note 17, at para. 45).

¹³⁴ Subcommittee on Prevention of Torture, Fifth Annual Report, *op.cit.* note 20, at para. 22.

¹³⁵ Statement by Mr Malcolm Evans, *loc.cit.* note 26.

¹³⁶ Subcommittee on Prevention of Torture, Fifth Annual Report, *op.cit.* note 20, at para. 21.

¹³⁷ *Ibidem*, at para. 22. These are also published on the SPT's website: Subcommittee on Prevention of Torture, 'Annual Reports Received by the SPT from National Preventive Mechanisms', available at: www2.ohchr.org/english/bodies/cat/opcat/annualreports.htm.

¹³⁸ *Ibidem*.

¹³⁹ This happened after the third Meeting of States parties to OPCAT which took place on 28 October 2010 when, as required by Art. 5(1), the membership was extended to 25 members as the number of OPCAT State Parties had reached 50. See: SPT, Fourth Annual Report, *op.cit.* note 17, at para. 10.

¹⁴⁰ *Ibidem*, at para. 11.

The Bureau is now composed of 5 members: the Chair and 4 Vice-Chairs, each of whom exercises direct responsibility for a discrete area of operational activity as set out in the SPT's mandate. Thus there is a Vice-Chair for (a) visits, (b) work with NPMs, and (c) engagement with international and regional bodies, all complemented by a Vice-Chair-Rapporteur with responsibility for developing 'jurisprudence'. See Statement by Mr Malcolm Evans, *loc.cit.* note 26. Previously the Bureau consisted of three members (the Chairperson and two Vice-Chairs); Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 11.

Europe and Latin America) with the rationale being explained as: '(...) to undertake liaison and facilitate coordination of Subcommittee's engagement within the regions they serve'.¹⁴¹

Thus, the regional focal points are to serve as Regional Task Forces, headed by a Regional Focal Point and 'comprised of members drawn from across all regional groupings, to ensure a universality of approach in their work'.¹⁴² The Fifth Annual Report provides further clarity:

For the purposes of its internal work, the Subcommittee has divided States parties into four broad regions; Africa, Latin America, Asia-Pacific and Europe. Each of these task forces is headed by a Regional Focal Point, and is assisted by an NPM Team, which consists of members who are assigned responsibilities for specific countries. Each NPM Team is composed of a combination of Subcommittee members from within the region, as well as members from other regions. In allocating members to these NPM Teams consideration was also given to gender, experience, expertise, and where possible, a common working language. Further, the number of members in each NPM Team reflects the number of States within the given region, and the realities of Subcommittee membership and availability. The Subcommittee is hopeful that this change will make its work with NPMs more constructive and active. The teams will meet individually at each session of the Subcommittee, giving detailed consideration to the situation regarding NPMs within their region and advising the Plenary accordingly.¹⁴³

The overall aim of this internal reshuffle is to enable more 'meaningful and structured engagement with NPMs'¹⁴⁴ and indeed, the first tangible results of this are already there. For example, recently the SPT was able to lend support to the process of adopting NPM legislation in Kyrgyzstan and Kazakhstan. It is, thus, expected that the Regional Focal Points and NPM teams will play a crucial role in defining the SPT's engagement with individual NPMs as well as the involvement of the Subcommittee in various activities carried out by other actors. Evidently, the SPT is finally becoming creative in overcoming the obstacles towards the implementation of its mandate which emanate from insufficient funding.

6. CONCLUSION

For the first time in international human rights law, a treaty has put in place a scheme for prevention. Through instalment of a double-tier system with the SPT operating

¹⁴¹ Subcommittee on Prevention of Torture, Fourth Annual Report, *op.cit.* note 17, at para. 12.

¹⁴² Statement by Mr Malcolm Evans, *loc.cit.* note 26.

¹⁴³ Subcommittee on Prevention of Torture, Fifth Annual Report, *op.cit.* note 20, at para. 40.

¹⁴⁴ *Ibidem.*

at the international scene and NPMs functioning nationally, OPCAT is the first UN human rights treaty that actually proposes a concrete way for how State Parties can go about ensuring effective implementation of the obligation to prevent torture. It cannot be disputed that of the two prevention tiers that OPCAT puts in place, it is the national one which has the greatest potential to make real, tangible difference. NPMs, as 'on the spot' visiting bodies, have the ability of visiting places of deprivation of liberty frequently; they have the opportunity to engage with legislative and institutional frameworks; and they have the intimate knowledge and understanding of local socio and geo-political contexts thereby making a meaningful contribution to the strengthening of national preventive systems. It is therefore not at all surprising that a large part of the SPT's mandate is about ensuring that in each State Party NPMs operate as they ought to.

OPCAT has already had remarkable effect in countries that have become parties to this unique instrument in that, through SPT's and NPM visits, it has allowed for enhanced transparency in places of deprivation of liberty in countries where such places have been shut to the public eye. The role of the SPT is certainly to promote this further but, as an international body, the SPT can only ensure periodic engagement with State Parties. This periodicity of engagement which the SPT is able to provide is why the role of NPMs becomes of paramount importance. They are natural partners to the SPT and, when functioning properly, can ensure the continuity of engagement at the national level that the SPT cannot.

The initial five years of the SPT's work have been hampered by insufficient funding and against this background the Subcommittee hesitated in establishing creative ways on how to engage with NPMs. This hesitancy, in turn, led to the development of a major chasm between the theoretical framework established by OPCAT and the reality of its implementation.¹⁴⁵

It is evident that the SPT itself has become acutely aware of this unfortunate discrepancy. The Fourth Annual Report was a careful sign that the Subcommittee is reconsidering its approach to the way it has been engaging with its mandate, especially in relation to NPMs. The statement of its Chairperson Malcolm Evans to the UN General Assembly when presenting it was a further bold step as he stated that 'the establishment of independent, fully functioning and properly resourced NPMs in accordance with the OPCAT criteria is the most significant single thing which a State can do to prevent torture and ill-treatment occurring over time'.¹⁴⁶

The Fifth Annual Report and the announced programme of work for 2012 firmly cements a turning point in the way the SPT has been approaching its engagement with NPMs and it cannot come a minute too soon. There are 63 State Parties to OPCAT but only about half have in fact established their NPMs. Moreover, the functioning

¹⁴⁵ Egan, S. 'The Optional Protocol to the Convention Against Torture: Paying the Price for Prevention', *Irish Jurist*, December 2009, pp. 182-202, at p. 182.

¹⁴⁶ Statement by Mr Malcolm Evans, *loc.cit.* note 26.

of some of those NPMs leaves a lot to be desired as NPMs around the world struggle with problems such as lack of adequate funding, insufficient guarantees of independence and absence of proper training. The SPT is the body which has the mandate, legitimacy and the requisite clout to support NPMs in their attempts to overcome these obstacles. If the initial role of the Subcommittee is a 'paternalistic interest in the operation and functioning of the mechanisms',¹⁴⁷ the next step is about recognising the interdependence in the relationship between the SPT and NPMs, which is necessarily required if the preventive system envisaged by OPCAT is to work. NPMs need the support of the SPT in order to become the fully-fledged national partners to the Subcommittee in OPCAT's torture prevention system. To this end, the equilibrium between the 'paternalistic interest' and a mature partnership must be found in relationships between the SPT and each individual NPM. And after five years, the SPT is finally on its way to do just that.

¹⁴⁷ Evans, M. and Haenni-Dale, C., *loc.cit.* note 25, at p. 52.